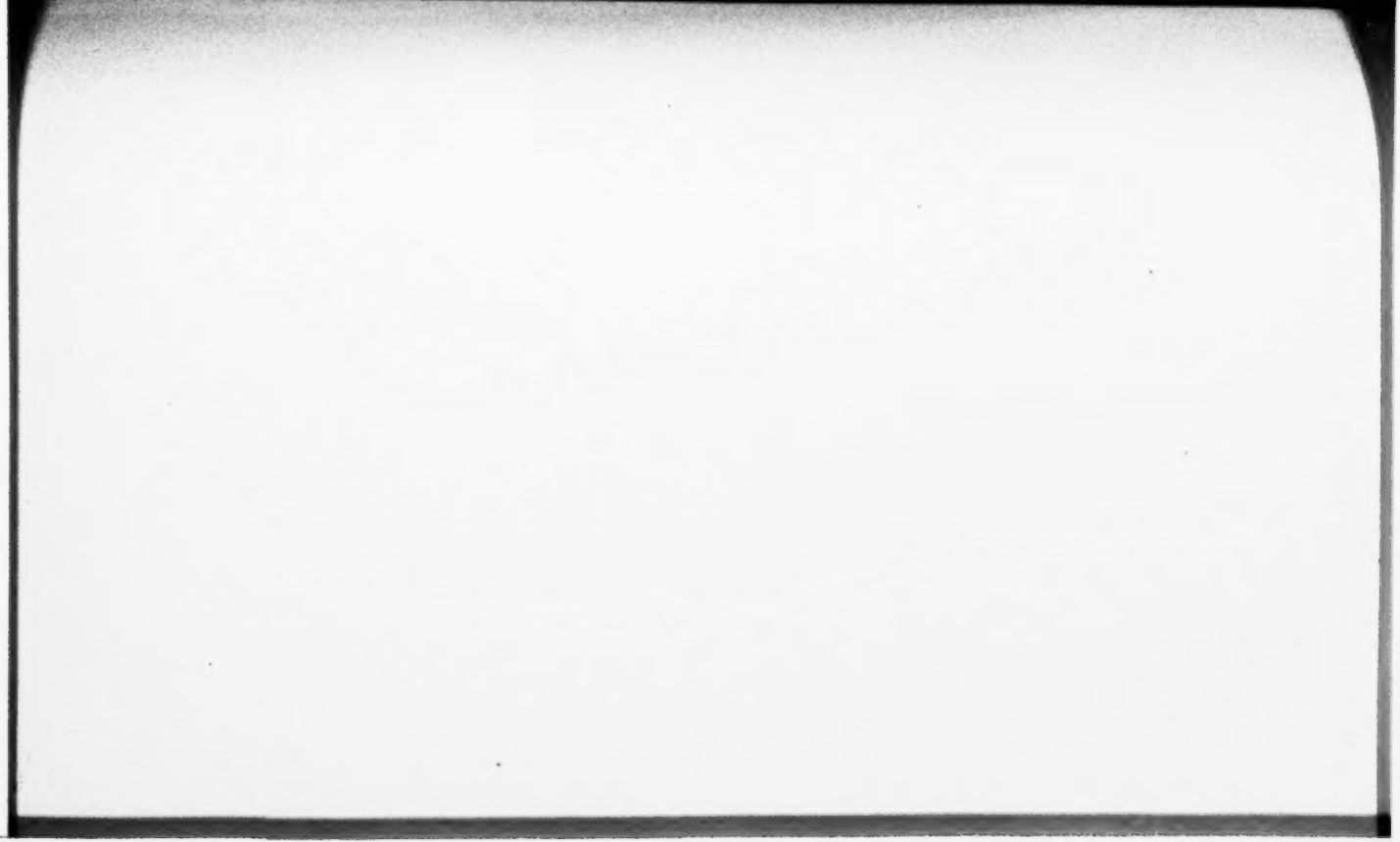

3907

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 502.

FRED HARDY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the District of Alaska.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH F. GOULD,

Att'y for Plaintiff in Error.

The plaintiff in error, Fred Hardy, was tried for murder of one Con Sullivan of Unalaska, District of Alaska, in September, 1901, found guilty of murder in the first degree and sentenced to be hanged December 6, 1901.

There are thirty-two assignments of errors. Counsel for plaintiff first received notice of the assignment of this case April 24, 1902, since which time he has examined the assignments and record so far as he has been able and respectfully submits that the following assigned errors I, IV and XV are reversible errors.

(I) That the United States District Court for the District of Alaska, Second Division, erred in overruling the motion for a continuance, interposed by defendant, the plaintiff in error.

(IV) The Court erred in permitting the plaintiff to propound to the juror Hayden, the following question. "Have you any such conscientious scruples or opinion as would prevent or preclude you from rendering a verdict of "guilty" where the penalty prescribed by law is death, upon what is known as circumstantial evidence?"

(XV) The Court erred in permitting the plaintiff to introduce in evidence the statement, or purported statement, made by the defendant Hardy to one R. H. Whipple, United States Commissioner, and the Court erred in permitting the said Whipple to give any testimony in relation thereto.

(V and VI are same as error IV.

Record discloses that Hardy was arrested at Unimack Island, Alaska, July 27th, committed to public jail at Unalaska and indicted August 22d for the murder of Con Sullivan, alleged to have been committed June 7th, 1901; arraigned August 24th; counsel appointed by the Court; a plea of "not guilty" entered, whereupon his counsel filed a motion for continuance, supported by the affidavit of Hardy (page 2) who alleged, among other matters, that Capt. Mackintosh and mate Johnson of Schooner "Arago," would, if present, testify that Hardy did not leave schooner until June 11th, subsequent to the killing of Con Sullivan; that in no other way could this fact be proven; that he had used due diligence; that they were essential and material witnesses to a fair and impartial trial; and that these facts could be proven by no other witnesses. Motion for continuance overruled. Trial began September 2, 1901. Motion should have been granted.

Where a party by the use of all the diligence appropriate to the circumstances and without fault on his part has been unable to make that preparation which is necessary to a fair trial, the Court should postpone the trial until a later day in the same term or continue the cause upon proper application..... The accused is entitled to a continuance where he is brought to trial so speedily after his arrest or indictment that he cannot make a proper defense or where he requires further time by reason of his close confinement in prison since his arrest.

Amer. & Eng. Enc'y of Pleading & Practice, Vol. 4, page 834.

Metts v. State, 29 Ga. 271.
Howell v. State, 5 Ga. 48.
State v. Lewis, 1 Bay (S. Car) 1.
State v. Brooks, 39 La. Ann. 239.
State v. Moultrie, 33 La. Ann. 1147.
Newman v. State, 22 Neb. 356.

Failure to grant motion was clearly error and abuse of discretion.

In Isaac vs. United States, 159 U. S., 487
Goldsby, alias Cherokee Bill vs. United States, 160 U. S., 70
Means vs. Bank of Randall, 146 U. S., 620

and a long line of authorities it is held that although a motion for continuance is purely a matter of discretion, yet it is subject to review when an abuse of discretion is shown.

The prevailing modern doctrine is, that although the presiding judge has a discretion in ordering the business of his court and determining whether it is proper or not to postpone or continue a case, yet if a refusal to continue a case constitutes a flagrant abuse of that discretion, it is sufficient ground, in accordance with the great preponderance of authority, for reversal of the judgment on appeal of error.

Amer. & Eng. Enc'y of Pleading & Practice, Vol. 4, page 904.

The discretion to be exercised is not to be an arbitrary but a sound judicial discretion.

Irving vs. State, 20 Tex. App. 12.
State vs. Poe, 76 Tenn., 647.

It is respectfully submitted that the record shows a clear abuse of discretion. As already stated Hardy was not represented by counsel until August

21th. No attorney could have been had prior to August 17th. Affidavit of Hardy is full and complete and fully covers objection raised in Isaac vs U. S., supra. The witnesses Mackintosh and Johnson were material witnesses. Hardy used all diligence possible. At no time after his arrest could he have obtained presence of these witnesses. They were on the seas on their way to California where they could have been reached in due time.

On trial for murder a continuance should be granted for the purpose of obtaining witnesses from Europe where no laches is attributable to the defendant and where only a short time has intervened between the arraignment and the trial.

State vs. Klinger, 43 Mo. 127.

In the case of felony the prisoner is entitled, after being furnished with the names of the witnesses against him, to a reasonable time in which to bring testimony from the counties in which such witnesses live.

United States vs. Stuart, Case No. 16, 401.

Testimony could not be obtained from any other witness. Prisoner was forced to trial without opportunity of procuring a single witness.

Testimony of Owen Jackson shows murder was committed June 5th, 1901 (page 89), although on page 94 he is uncertain of date, but thinks it was June 7th. Is unable to give any description of murderer. On page 89 it appears he supposed the killing to have been done by the Indians.

If Hardy could, as he states, have shown by testimony of Capt. Mackintosh and mate Johnson that he did not leave the "Arago" until June 9th or later,

then the jury could not of right have found him guilty of murder.

The evidence shows that Hardy on June 17th had in his possession property of Con Sullivan, but no witness has been produced by the Government who saw Fred Hardy on Unimack Island before that date; no evidence whatever that Fred Hardy was on Unimack Island on June 5th or 7th except statement of witness Aston (who was arrested at the same time Hardy was) who says: (page 331) "I had a conversation with Hardy and asked him when he left the 'Arago' and he said, 'three or four days after you did.'" Aston claims to have left June 2nd. This is all the testimony produced by the Government that Hardy was anywhere on Unimack Island before June 9th or 10th and clearly fails to show Hardy near the scene of the murder June 5th, 6th or 7th, or, in fact, any time up to June 17th. That Hardy stole is probable, but possession of property of Con Sullivan is not sufficient to show murder.

Counsel clearly understands that this court cannot review findings of fact by the jury, and that the action of the trial judge in overruling motion for new trial is not reversible error, yet these facts are submitted for the purpose of showing that Hardy's statement as to when he left the "Arago" is not disputed by a solitary Government witness. Nothing in the evidence clearly shows his story to be false or that Mackintosh and Johnson would not have corroborated him. Had Hardy been able to produce these witnesses, Hardy's whereabouts on June 5th and 7th could have been established beyond a doubt.

If Hardy was, as he says, on the "Arago" up to June 9th, he could not have committed the murder. From June 9th to June 17th he had ample opportunity to obtain property as he says he did in his testimony. Nothing in the case, I submit, shows his statement as to when he left the "Arago" to be false.

Situated as the prisoner was, remote from friends and acquaintances, the only persons who could testify as to his whereabouts on the day of the murder, on the high seas, to bring him to trial under these circumstances and force him to fight for his life without being able to procure witnesses, is an unwarranted and arbitrary abuse of the discretionary power of the court. If the action of the trial judge in refusing to grant a continuance in this case was not an abuse of discretion, it is difficult to conceive what would constitute an abuse.

It is respectfully submitted that it is not the policy or the spirit of our laws to railroad a man to his death until he has had a fair and reasonable opportunity to prepare his defense. To hold otherwise places the life of the prisoner in the hands of an arbitrary judge who can send a man to his death without that fair and impartial trial which of right belongs to every citizen.

ASSIGNMENT OF ERROR IV.

The Court erred in permitting the plaintiff to propound to the Juror Hayden the following question. "Have you any such conscientious scruples or opinion as would prevent or preclude you from rendering a verdict of "guilty" where the penalty

prescribed by law is death, upon what is known as circumstantial evidence?"

In Sections 3 and 4 of Chapter 429 of the statutes of the United States 1898-9, criminal laws for the District of Alaska it is provided that if a person is found guilty of murder in the first degree the jury may also find "without capital punishment." Questions should have been excluded as a misstatement of fact. It assumes that death penalty should necessarily follow verdict of murder in the first degree. It impresses this fact irrevocably upon the minds of the jurors and thereby tends to deprive the defendants of the benefits of said sections. The jurors cannot fail to be impressed by such interrogatories that in the case of verdict of murder in the first degree is rendered, under their oaths and under such examination as the court has permitted they are precluded from qualifying their verdict "without capital punishment," notwithstanding the presiding judge in his charge to the jury instructed them they could do so. Such a line of questions as was permitted by the Court virtually binds the jurors to see that the prisoner does not escape death penalty if the verdict of murder in the first degree is rendered and thereby prejudices the rights of the defendant.

The attorney for the Government should have been compelled to modify his question by striking out the words "where the penalty prescribed by law is death" and insert "where the penalty prescribed by law may be death." It is submitted that the Court was in error in permitting the question to be put, as set forth in above assignment.

ASSIGNMENT IN ERROR XV.

The Court erred in permitting the plaintiff to introduce in evidence the statement, or purported statement, made by the defendant Hardy to one R. H. Whipple, United States Commissioner, and the Court erred in permitting the said Whipple to give any testimony in relation thereto.

Statement of Hardy clearly inadmissible by Section 309 of Chapter 429 of U. S. Statutes already referred to.

First. Statement taken by committing magistrate of prisoner brought before him for examination, but before examination of the witness on the part of the Government had been closed before the magistrate.

Second. That it does not appear from the testimony that the magistrate informed the defendant that if he waived making a statement his waiver could not be used against him in trial.

Third. Also upon the ground that it does not appear from that statement that the defendant stated that he was asked his age or name, or where he was born, or where he resided, or how long he had resided in any place stated by him. Neither does it appear therefrom that he was asked or stated what was his business or occupation. Neither does it appear that he was asked by the committing magistrate to give any explanation that he might think proper under the circumstances appearing in the testimony against him, nor to state any facts which the defendant might think would tend to his exculpation. Nor does it appear that the answer of the

defendant or that any answer of the defendant was read to him as each question was asked.

Fourth. That the statement is not authenticated in the manner prescribed by statute.

Fifth. That there is no authentication by the United States commissioner to the effect that the defendant was informed of his rights as provided in section 307, title 1, or that after being so informed he made the statement.

Statement was introduced for the purpose of discrediting Hardy before the jury and thereby must be held injurious.

Jos. F. Gould
Atty for P.E.